QUESTION PRESENTED

Are children seeking Supplemental Security Income disability benefits entitled to an individualized determination of all their impairments and functional limitations based upon the requirement of 42 U.S.C. § 1382c(a)(3)(A) that they be found disabled if they have "any" mental or physical impairments of "comparable severity" to those which would cause an adult to be found disabled?

TABLE OF CONTENTS

Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OTHER AUTHORITIES

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1614(a)(3)(A) and (F) of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(A) and (F) (1982 & Supp. IV 1986); 20 C.F.R. §§ 416.920a(c)(3), .924, .925(a), .945(a), .994(c); and SSA, Program Operations Manual System, DI 00401.335, are reproduced at Appendix, *infra*.

STATEMENT OF THE CASE

A. Statutory Framework

To complement the Social Security insurance programs, Congress in 1972 established the Supplemental Security Income ("SSI") program for indigent people who are 65 or over, blind or disabled. 42 U.S.C. § 1381, *et seq.* (1982 & Supp. IV 1986). Congress, in recognition of the extraordinary living expenses of disabled children, extended SSI in the "belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society." H.R. Rep. No. 231, 92d Cong., 1st Sess. 147-48 (1971), *reprinted in* 1972 U.S. Code, Cong. Admin. News 4989, 5133-34.

An adult is disabled under SSI if he or she "is unable to engage in any substantial gainful activity ["SGA"] by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c (a)(3)(A).[1] This same provision also states that a child under 18 years of age is disabled, "if he [or she] suffers from *any* medically determinable physical or mental impairment of *comparable severity*." (emphasis added).

---

[1] This is the same disability test that Congress had legislated earlier for disabled adults, and adults claiming to have had a disability in childhood, in the Title II Social Security Disability Insurance program. *See* 42 U.S.C. § 423(d)(1)(A) (general definition for "disability" for disability insurance benefits); § 402(d)(1)(C) (incorporating general definition for Child Disability insurance benefit).

Congress, by adopting the same disability test from Title II, and by invoking the "comparable severity" standard for SSI children claimants, required near identity of treatment between disabled children and adults claiming SSI benefits. Nonetheless, the Secretary established two markedly different regulatory methods and tests to measure the disabling severity of the medical impairments of adult and child claimants. This disparate treatment denies children the realistic, individualized assessment of their functional limitations which adults receive. The result is that a disability claimant under 18 is denied SSI benefits where a claimant over 18 with the identical functional limitations would be granted such benefits. The dispute here is whether Congress intended disabled children to have such dissimilar, and inferior, evaluation of their claims.

B. Regulatory Scheme—Adult Disability Evaluations

Under the SSI program, adults are evaluated using the same five-step sequential evaluation process as is used in the Title II adult and child disability insurance programs. *See Bowen* v. *Yuckert*, 482 U.S. 137, 140-42 (1987); 20 C.F.R. §§ 416.920, 404.1520. At step one, it is determined whether the claimant is engaging in "substantial gainful activity" ("SGA"); if so, the claim is denied. 20 C.F.R. § 416.920 (b). If the applicant is not working, the decision-maker determines, at the second step, if there is a "severe impairment" which "significantly limits . . . physical or mental ability to do basic work activities . . . ." 20 C.F.R. § 416.920(c). The claim is denied if there is no "severe impairment," which screens out obviously ineligible claimants. *Yuckert*, 482 U.S. at 141.

If the impairment is "severe," the evaluation proceeds to the third step to determine whether the impairment(s) "is listed in Appendix 1 [of 20 C.F.R. pt. 404, subpt. P] or is equal to a listed impairment(s) . . . ." 20 C.F.R. § 416.920(d). Such "listed" impairments are considered by the Secretary "severe enough to prevent a person from doing *any gainful* activity," not

merely "*substantial* gainful activity." 20 C.F.R. § 416.925(a) (emphasis added).[2]

This third step was intended to "streamline" the decision-making process by identifying claimants with the most severe medical impairments, *Yuckert*, 482 U.S. at 153, granting benefits "without further inquiry" into the complete impact of the claimant's disabling impairments, *Heckler* v. *Campbell*, 461 U.S. 458, 460-61 (1983). The listings embody very high levels of severity so that a qualifying claimant may be "conclusively presumed to be disabled and entitled to benefits." *Bowen* v. *City of New York*, 476 U.S. 467, 471 (1986). Further, the Secretary has repeatedly stated that the listings, whether adult or childhood, do not attempt to include all impairments that may be disabling, but rather include only the more "commonly" or "frequently" diagnosed conditions.[3]

Claimants who do not satisfy the precise requirements of a listed impairment also can be found disabled at step three if their impairments are considered "medically equal" to a listed impairment. 20 C.F.R. §§ 416.920(d), 416.926. What constitutes "medically equal" has been the subject of conflicting positions by the Secretary. Since at least 1980 the Secretary has prohibited consideration of the functional consequences of

---

[2] The listings severity level is thus set at a threshold considerably higher than that of the statute. *See* 42 U.S.C. § 1382c(a)(3)(A) ("unable to engage in any substantial gainful activity").

[3] *See, e.g.*, 50 Fed. Reg. 50068, 50069 (1985) (list contains only most "frequently diagnosed" impairments); 44 Fed. Reg. 18170, 18175 (1979) ("The Listings criteria are intended to identify the more commonly occurring impairments . . ."). The Secretary acknowledges that experience may reveal that he "overlooks certain impairments" (Pet. Br. 42). Such "oversights" miss entire categories of childhood impairments, such as Down and Tourette Syndrome. No usable list can ever encompass all potentially disabling impairments. Thus, while we welcome the Secretary's recent proposal to update the childhood listings for mental impairments, 54 Fed. Reg. 33238 (1989), they too can never hope to encompass every disabling condition.

impairments at step three under the "equals" concept. Instead, he confines his inquiry to matching precise clinical findings with those in his listings. Social Security Ruling ("SSR") 83-19. (J.A. 236).[4] The Ruling provides that "it is incorrect to consider wh[e]ther the listing is equaled on the basis of an assessment of *overall* functional impairment . . . . The functional consequences of the impairments (i.e., RFC) [Residual Functional Capacity], irrespective of their nature or extent, *cannot* justify a determination of equivalence." (J.A. 239-40) (emphasis in original).[5]

At the final two steps of the five-step process, the Secretary "must assess each claimant's *individual* abilities." *Campbell*, 461 U.S. at 467 (emphasis added). He determines whether the claimant can pursue former work (step four) or any other work in the national economy (step five), given his or her "residual functional capacity" ("RFC"). RFC is, in turn, based upon all medical and functional factors. The RFC evaluation of "individual abilities" is made by a reviewing physician. *City of New York*, 476 U.S. at 471 n.1. It is *separate* from the purely vocational assessment, based on the statutory factors of "age, education and work experience," 42 U.S.C. § 1382c(a)(3)(B), used to determine whether jobs exist which the claimant could perform. 20 C.F.R. §§ 416.920(e) & (f), 416.960-.969. *See Campbell*, 461 U.S. at 467.

RFC is a "*medical* assessment" of what the claimant "can still do despite [his or her] limitations," 20 C.F.R. § 416.945(a) (emphasis added), and broadly encompasses basic physical abilities (*e.g.*, "walking, standing, lifting, carrying, pushing . . ."), § 416.945(b), and mental functioning (*e.g.*, "ability to understand, to carry out and remember instructions . . ."),

---

[4] Social Security Rulings are statements of policy that lack the force and effect of law but are binding on all Social Security adjudicators. 20 C.F.R. § 422.408; *see Heckler* v. *Edwards*, 465 U.S. 870, 873 n.3 (1984).

[5] The failure of the Joint Appendix to emphasize the word "overall" is a typographical error.

§ 416.945(c).[6] *See also* SSA, Program Operations Manual System ("POMS"), DI 24510.001 (Residual Functional Capacity). (J.A. 244).[7] According to the POMS, RFC includes not only formal medical evaluation but "descriptions and observations of the claimant's restrictions by both medical and non-medical sources." (J.A. 245). When multiple physical and/or mental impairments are present, "the RFC is derived from an assessment of the remaining functional capacity after consideration of all impairments." *Id.*

The inquiry at steps four and five is also the point at which the Secretary considers pain, nausea, dizziness, side effects of medication, and other symptoms which "may include descriptions (even your own) of limitations that go beyond the symptoms that are important in the diagnosis and treatment of your medical condition." 20 C.F.R. § 416.945(a); *see also* 42 U.S.C. § 1382c(a)(3)(G)(Supp. IV 1986). The Secretary recognizes that where "the listed impairment criteria are not met or equaled, but one or more of the impairments are severe, . . . [i]n assessing symptoms such as pain, as a factor of RFC, *the functionally limiting effects of the symptom* can play a significant role." SSA, POMS DI 24510.030 (J.A. 256) (emphasis added).[8]

---

[6] The Secretary's brief obfuscates the nature of the RFC assessment, by characterizing it as an assessment of "non-medical" factors. (Pet. Br. 16, 18, 26, 38). He draws an artificial distinction between evaluation of a child's "*medical factors* and evidence alone," and "individualized consideration of vocational or similar non-medical factors (or, therefore of the *claimant's RFC*)" (Pet. Br. 26) (emphasis added), erroneously suggesting that RFC is not a medical determination.

[7] The Program Operations Manual System is a set of guidelines, *Drombetta* v. *Sec'y of HHS*, 845 F.2d 607, 609 (6th Cir. 1987), for the state agencies that adjudicate all SSI claims. 42 U.S.C. § 421(a) (1982) & Supp. IV 1986).

[8] The breadth and focus on the individual in the RFC analysis here is critical because, despite the obvious relevance of an impairment's symptoms, such as pain, unless the exact clinical signs and laboratory

Because of the breadth of the RFC assessment, for whole classes of impairments, such as mental disorders, the RFC evaluation is the *primary* method for assessing disability. *See* SSR 85-16.[9]

Thus it is apparent that, for adults, the individualized RFC assessment, by realistically accounting for "each claimant's individual abilities," *Campbell*, 461 U.S. at 467, allows for an appropriately flexible approach for situations that defy "formal codification" (J.A. 97) or "cookbook adjudication." It allows for decisions to be made for claimants with multiple, combined impairments; claimants with unlisted impairments; and claimants with impairments whose symptomatology, while severe, does not match all of the elements or required proofs of a

---

findings are present, "the symptom cannot be persuasive [at the third step] that the Listing is met or equalled." SSA, POMS DI 24505.015(D) (J.A. 255):

> *No alleged or reported intensity of the symptoms can be substituted to elevate impairment severity to equivalency* . . . . "[S]evere," "extreme," or "constant" pain will not compensate for the missing medical findings and permit an 'equals' determination.

Id. (emphasis in original).

[9] SSR 85-16, which excludes "children under 18," emphasizes the "importance" and flexibility offered by an RFC assessment of an *adult's* mental disorder (West's Soc. Sec. Rpting. Serv. 424-28 (Rulings Supp. 1989). *See also* 20 C.F.R. § 416.920a(c)(3) (RFC evaluation of mental impairments "unless you are claiming benefits as a disabled child"). Other regulatory statements show how the RFC inquiry provides an individualized assessment, especially for mental disorders. *See, e.g.*, 50 Fed. Reg. 35038, 35046 (1985) (all limitations including the side effects of medication must be considered in assessing RFC); *id.* at 35051 ("Individuals with personality disorders which . . . do not meet or equal the listings would still have a detailed RFC completed which would lead to a finding of disability in appropriate cases."); *id.* at 35050 ("[D]isability for individuals with IQ's in the range of 70-79 is more appropriately determined when the individual's RFC and vocational factors are considered.").

particular listing. It also allows proper recognition of pain, side effects of medication, or other limitations. As the Secretary himself has concluded, "the determination of RFC is crucial if the person does not meet or equal the Listings." 50 Fed. Reg. 35038, 35042 (1985).

C. Regulatory Scheme—Childhood Disability Evaluations

Instead of the five-step sequential evaluation process, disabled child claimants receive only a three step evaluation. The RFC evaluation is never done for children, although it is for adults. (J.A. 74, 86-87). Children can be found eligible only if they meet or equal the listings of impairments. 20 C.F.R. §§ 416.924, 416.925. The child listings use the same medical assumptions and level of severity as the adult listings. 42 Fed. Reg. 14706 (1977).

The Secretary recognized in his initial promulgation of the child listings that there would be "children who have an impairment that is not included in the [listing] Appendix," 42 Fed. Reg. at 14706 (1977), and that the listings embody only the most "frequently diagnosed" impairments. *Id.*; *see* note 3, *supra*, and note 19, *infra*. Neither the 120-odd adult listings or the 57 children's listings can cover the hundreds of discrete disorders or the almost infinite combinations of impairments afflicting children.

This listings-only approach, coupled with the exclusion of functional assessment, was a significant departure from the early regulatory history of the SSI child disability program, as embodied in two Disability Insurance Letters issued by SSA (J.A. 89, 94). *See* pp. 27-33, *infra*. The Secretary's current position constitutes a more restrictive policy concerning "comparable severity," equivalence and the relevance of functional limitations than was adopted at the outset of the SSI program. *See id.*

D. Named Plaintiffs And Class Members

Brian Zebley initiated this action on July 12, 1983 and was joined by two intervenors, Joseph Love, Jr. and Evelyn Raushi.

Together they represent a certified class of denied child applicants and terminated child beneficiaries. (J.A. 27). The briefs of the amicus parties—a majority of states and over two dozen professional medical, disability, and children's organizations—further establish that severely disabled children, including those with impairments such as spina bifida, cystic fibrosis, Down Syndrome, and muscular dystrophy, have been routinely rejected for SSI under the listings criteria and denied individualized assessments of functional limitation.

Brian Zebley

Like many children brain damaged at birth, Brian has always suffered from multiple impairments: congenital brain damage with spastic right hemiparesis, mental retardation, developmental delay, eye problems and musculoskeletal impairments. *Zebley,* 855 F.2d at 70-71. Although Brian was initially awarded SSI at age two upon a finding that he met the mental retardation listing, he was terminated less than two years later on the grounds that he "no longer met or equaled the requirements of any section of the Listings of Impairments at Appendix 1." *Id.* at 71. (*See* J.A. 41-45).

The Secretary concluded that "Brian Zebley has significant limitations compared with other children of his age," including, at four years of age, the gross motor skills of a 16-19 month old, spasticity and uncoordination; misjudging of distances and frequent falling; and self-help and perceptual/fine motor skills at or below 50% of those of a normal child. (J.A. 43-44). Despite these developmental impairments which, "adjusting for age, [left] Brian . . . no better off now [at age four] than he was when benefits were initially awarded in 1980" (J.A. 29), the Secretary determined that Brian no longer met the childhood mental retardation listing and terminated his benefits.[10]

---

[10] The childhood mental retardation listing requires a delay in *all* developmental skills of "more than one half of the child's chronological age." 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 112.05(A). (J.A. 233). At 48 months of age, although Brian showed delay in gross motor and self-help skills of more than one-half his age, his non-motor skills, like cognition and language, were in the 36-42 month range. (J.A. 31, 43).

The "degree of severity" of impairment of Brian's motor coordination, that of a one to one-and-a-half year old when he was four years of age, is deemed irrelevant under the Secretary's listings-only policy. (J.A. 255). An "assessment of overall functional impairment" is also explicitly prohibited by the Secretary in multiple impairment cases. SSR 83-19 (J.A. 239); SSA, POMS DI 24505.015(C) (J.A. 251). The district court found that the Secretary's decision was not supported by substantial evidence of improvement, but noted that he could revisit the case again. (J.A. 34).

Joseph Love, Jr.

Joseph Love, Jr. was ten years old in 1983 when he was denied SSI benefits despite organic brain syndrome manifested by a psychiatric impairment (a severe adjustment disorder with mixed emotional and behavioral disturbances), a neurological impairment (severe hyperkinesis), and involuntary movements with visual/motor misperception. (J.A. 52-53, 56).[11] Joseph not only failed first grade three times but also could not adapt to special education classes, necessitating home-bound instruction. (J.A. 50). At the time of the ALJ hearing, he was functioning on a kindergarten level although he had been in school for four years. These educational failures had caused him "severe emotional stress." (J.A. 54).

Because Joseph could undertake some "self-care" activities ("he help[ed] with the dishes occasionally") (J.A. 51), he did not meet *all* four of the listed criteria for childhood psychosis or non-psychotic disorders, §§ 112.03, 112.04 (J.A. 232-33). He also did not have a complete arrest in development (as opposed to impaired development) as required by the chronic brain

---

[11] Joseph also was diagnosed as suffering from an attention deficit disorder and described "as being very impulsive, apprehensive and a poor learner. He was unable to relate with his peers, control his aggressions easily or learn." (J.A. 53). He went to sleep at 2:00 a.m., woke at 6:00 a.m., was unable to sit still, and was constantly climbing on top of things, sliding across the floor, running up and down steps, getting upset easily, and becoming depressed. (J.A. 50-51).

syndrome listing. § 112.02 (J.A. 232). On further appeal, the district court remanded the case to the Secretary for a new determination. (J.A. 37).[12]

A psychiatric consultant in the Secretary's national Office of Disability admitted that Joseph's precise symptoms appear "fairly often" in both children and adults. (J.A. 85-86). While he acknowledged that an *adult* with such symptoms could be found disabled by an individualized RFC assessment, a *child* with the "identical functional symptomatology" would never be found disabled. (J.A. 86-87).

Evelyn Raushi

Evelyn Raushi was born prematurely in 1974, and was determined disabled in 1979 based upon a 62 IQ. (J.A. 61). Her benefits were subsequently terminated as of October, 1981. *Id.* Further tests showed Evelyn had a developmental delay of two years manifested by "emotional immaturity and intellectual and social impoverishment consistent with [her] development delay"; "significant latent anxiety"; and, in addition to mental retardation, diagnoses of "developmental learning disorder" and "minimal brain dysfunction." (J.A. 63). Although the Secretary determined that Evelyn was retarded, he found that she did not suffer from another significant impairment, as required by listing § 112.05(C). (J.A. 64, 233).

Evelyn's case, however, was remanded to the Secretary for a new determination as to whether she showed "medical improvement" (J.A. 36) pursuant to Section 2 of the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(f) (Supp. IV 1986), and she was thereafter reinstated.

E. Court Of Appeals Decision

A unanimous Third Circuit panel found the Secretary's approach to be "inconsistent with the statute in precluding a

---

[12] Joseph was subsequently found disabled, but only for the period after Nov. 15, 1985. That decision is still in litigation.

finding that a child is disabled unless his impairment meets or equals a listed one." 855 F.2d at 73-74. The court determined that "Congress has expressed unambiguously its intent that 'any' impairment which meets the statutory standard shall be found disabling. Therefore, the Secretary's regulatory method for determining disability must be adequate to identify any qualifying impairment." *Id.* at 73. The court reasoned that the listings, designed to identify only the most severely disabled claimants for quick, presumptive awards, "do not purport to be an exhaustive compilation of medical conditions which could impair functioning to the extent necessary to satisfy the statutory standard for disability," yet only adults are given the further opportunity to establish eligibility through an "individualized assessment of the *actual* degree of functional impairments . . . ." *Id.* (emphasis in original). Because it was the expressed intention of Congress to allow children to show that they suffered from "any" impairment of "comparable severity" to one "which would actually, even if not presumptively, disable an adult," the Secretary's regulatory method identifying "only *some* comparable impairments" was held to be inadequate. *Id.* at 73-74 (emphasis in original).

The court specifically rejected the reasoning in *Hinckley* v. *Sec'y of HHS*, 742 F.2d 19 (1st Cir. 1984), and *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982). *Powell* mistakenly characterized child claimants as arguing that comparability required the Secretary to make up childhood analogues for the adult vocational factors of age, education and work experience. The real question at issue, however, is whether children are entitled to an individualized functional assessment of the impact of their impairments, notwithstanding the inapplicability of vocational factors. 855 F.2d at 74. The Third Circuit also criticized *Hinckley's* mistaken reliance upon equivalence as affording functional assessment, noting that the Secretary has stated that the functional consequences of impairments cannot justify a determination of equivalence. SSR 83-19. Since the Third Circuit decision, the Secretary's equivalence regulation has been struck down in *Marcus* v.

Bowen, 696 F. Supp. 364 (N.D. Ill. 1988), *appeal pending*, No. 89-2717 (7th Cir.), which contains a thorough discussion of the regulatory history of the Secretary's listings-only policy and particularly the shortcomings of his equivalence policy.[13]

Rather than "jettison[ing] the entire regulatory framework," as the Secretary characterizes the decision (Pet. Br. 42), the Court of Appeals retained the regulatory scheme, remedying only the absence of an assessment of the impact of functional limitations. In holding that the Secretary must evaluate the impact of the child's impairment and make individual assessments of the possible disabling effects, the court did not encroach upon the Secretary's prerogative to devise a standard against which to assess a child's residual function capacity. As Judge Mansmann wrote, "We see no necessity for such an intrusion upon the Secretary's authority." 855 F.2d at 75. The Court of Appeals left the Secretary considerable latitude to augment his approach to children's disability to make it truly comparable to that afforded adults.

SUMMARY OF ARGUMENT

Realistic assessment of functional limitations is the guiding principle in all disability determinations. The Secretary's inferior program for evaluating children's SSI claims is contrary to the plain meaning of the SSI statute which commands that a child be found disabled if he or she suffers from any impairment of comparable severity to that which would render an adult disabled. Since adults are individually assessed to determine their actual residual functional capacity, if they do not meet one of the specific listings set at high levels of presumptive disability, it violates this "comparable severity" stan-

[13] The Eighth Circuit has ruled in favor of the Secretary, albeit on the limited ground that the particular listing in question apparently allowed inquiry into function so as to obviate the need to hold the Secretary's overall approach to be unlawful. *Nash* v. *Bowen*, No. 88-2542 (August 10, 1989).

dard to stop the inquiry for children once it is determined that they do not meet one of these listings. The Secretary has recognized that the listings are designed to screen for common impairments that can be presumed disabling, and has repeatedly acknowledged their inherent inadequacy for individually assessing actual functional loss.

The Secretary has explicitly recognized that, by limiting children to a listings-only test, he is using the "any gainful activity" test of the widow's disability program, instead of the "substantial gainful activity" test of the adult disability program. Because Congress chose to make children subject to the more liberal test of the adult program, however, the exclusive use of the listings for children imposes a level of severity that exceeds the statutory standard.

The Secretary's current interpretation is not due any special deference because it was not developed contemporaneously and is inconsistent with his earlier interpretations. Further, because the Secretary's current interpretation was never made known to Congress, it did not give, and could not have given, its approval to that interpretation through its passage of related legislation or otherwise. Indeed, the legislative history of the related legislation relied upon by the Secretary shows that Congress was dissatisfied with his inaction in implementing the SSI children's program, and suggests that Congress endorsed a more flexible approach that went beyond the listings.

The Secretary's argument that there are no feasible benchmarks for individually assessing children's functional limitations is belied by his own policies and regulations, which specifically endorse assessment of "age-appropriate activities" as such a workable standard, as well as by the accepted diagnostic and treatment practices of the medical community. Indeed, both in assessing medical improvement in disabled children and in determining entitlement to Title II disability benefits for disabled adults who became disabled when they were children, the Secretary already explicitly analogizes abil-

ity to work with ability to perform age-appropriate activities and other "work-like" activities performed by children.

ARGUMENT

I. THE SECRETARY VIOLATES THE "COMPARABLE SEVERITY" STANDARD OF THE ACT BY DENYING DISABLED CHILDREN INDIVIDUALIZED ASSESSMENTS OF THEIR FUNCTIONAL LIMITATIONS.

The holdings of this Court in *Campbell*, *Yuckert* and *City of New York* make it clear that assessment of functional limitations is to be the guiding theme governing all disability adjudications. While the Secretary may take steps to ease his workload by developing methods to deal with certain repetitive employment questions not unique to the individual, *Campbell*, or to weed out cases where the claimant has only a slight impairment, *Yuckert*, he has never been permitted to give less than a full assessment of the difficult question of whether disability exists. Never has it been suggested that convenience may outweigh individualized decision-making. Although "impairments" may be medically catalogued, "disabilities" can only be adjudged by examining how a medical condition actually affects an individual.

While asserting that the listings take into account the impairment's "impact on development" (Pet. Br. 38), the Secretary nevertheless admits that "regulations focus . . . not on the individual child's ability to function as such" (*id.* 42). He also admits that, in his asserted consideration of "impact," he gives "no individualized consideration" to RFC or functional limitations but instead makes a "legislative-type assessment" of impact. (*Id.* 38). Insofar as impact is considered, then, it is on the basis of predicting average functional loss from diagnostic findings.

The reality for disabled children is that the Secretary's policies have established a listings-only methodology for evaluating childhood disabilities that, on its face, precludes any fair and realistic assessment of the functional impact of childhood

impairments on the individual child. As such, this methodology may not be used to disqualify those who meet the statutory definition of disability. *See Yuckert*, 482 U.S. at 158 (O'Connor, J., concurring).

A. The Statute Plainly Envisions An Individualized, Functional Test For Children.

The search for the proper method of evaluating the impairments of children begins with the meaning of § 1614(a)(3)(A) of the Social Security Act. The same statutory authorization that gives the Secretary rulemaking authority circumscribes this authority to prescribing procedures "not inconsistent with the provisions of this title." 42 U.S.C. § 405(a), made applicable to the SSI program by 42 U.S.C. § 1383(d)(1) (1982 and Supp. IV 1986), *see Campbell*, 461 U.S. at 466. At issue here is a "pure question of statutory construction for the courts to decide." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent. 480 U.S. at 447-48. In discerning the plain meaning of this statute, the court must look to the "express language" of the statute at issue as well as to the "language and design of the statute as a whole." *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, ____, 108 S.Ct. 1255, 1258 (1988) (Kennedy, J.) (rejecting "strained interpretation [of the Social Security Act] offered by the Secretary").

"The Social Security Act defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function . . . ." *Campbell*, 461 U.S. at 459-60. Functional loss is the talisman of our disability law. By looking to the ability to perform substantial gainful activity, given the person's "medically determinable physical or mental impairment," 42 U.S.C. § 1382c(a)(3)(A), the law takes a "functional approach to determining the effects of medical impairments." *Yuckert*, 482 U.S. at 146, 482 U.S. at 166 (Blackmun, J., dissenting). Instead of an approach based upon a finite number of diagnostic categories, and the average functional loss

thereby created, the disability program is meant to provide a "realistic, individual assessment of each claimant's ability to engage in substantial gainful activity." *City of New York*, 476 U.S. at 474.[14]

The evaluation of the actual performance abilities of adult disability claimants (the RFC assessment) is undertaken at the fourth and fifth steps of the sequential evaluation process, after it has been determined inappropriate to award benefits based solely on the listings. *Id.* at 471. This focus upon functional capacity was recently reinforced by § 4 of the Social Security Disability Benefits Reform Act of 1984, which requires that "the combined *effect* of the impairments shall be considered throughout the disability determination process." 42 U.S.C. § 1382c(a)(3)(G) (Supp. IV 1986) (emphasis added).

In *Campbell*, this Court interpreted the statute as "specifying consideration of each individual's condition," with the statutory scheme as a whole anticipating "individualized determinations" for each claimant. 461 U.S. at 458. As *Campbell* makes clear, the point at which the Secretary "must assess each claimant's individual abilities [*i.e.*, RFC]" comes after the listings evaluation. *Id.* at 467. There is simply no authority for the position of the Secretary that an inquiry as to whether a person meets or equals a listed impairment satisfies the statute's call for individualized assessment. (Pet. Br. 41-42). To the contrary, the outcome of *City of New York*, 476 U.S. at 474-75 n.5, refutes the Secretary's attempt to cast the listings stage as

[14] In contrast, Congress adopted the "average man" standard for veterans' disability benefits. 38 U.S.C. § 502 (a)(1) (impairment "sufficient to render it impossible for the average person to follow a substantially gainful occupation"). The "average man" standard has never been applied under the Social Security Act, as courts have uniformly held that each claim requires individualized adjudication. *See, e.g., Franklin* v. *Sec'y of Health, Education and Welfare*, 393 F.2d 640, 642 (2d Cir. 1968); *Dillon* v. *Celebrezze*, 345 F.2d 753, 757 (4th Cir. 1965). The Secretary has fully subscribed to the principle of individualized adjudication. *E.g.*, 43 Fed. Reg. 9291 (1978).

his vehicle for rendering individualized assessments of functional limitations.

When Congress recognized the extraordinary needs of poor, disabled children by including them in the new SSI disability law, it provided for the same individualized, functional assessments to apply to children as were applied to adults. No separate program or alternative methods were legislated for disabled children. Rather, the same approach was provided by the express linking of children to the definition of disability for adults in the new SSI law, 42 U.S.C. § 1382c(a)(3)(A), a definition also employed in the pre-existing Title II program for disabled adult workers, and for adult children of deceased, disabled or retired workers, claiming a childhood onset of disability. 42 U.S.C. §§ 423(d)(1)(A), 402(d)(1)(C) (1982).[15] *See Yuckert*, 482 U.S. at 140.

When Congress enacted a "comparable severity" standard for children in § 1382c(a)(3)(A), the use of the term "severity" referred to the elaboration of the disability definition found in subsection (B), namely, impairments of such "severity" that they preclude "previous work" and "any other kind of substantial gainful activity." 42 U.S.C. § 1382c(a)(3)(B). That is the "severity" to which Congress intended children's impairments to be comparable. Therefore, the Secretary's suggestion (Pet. Br. 29) that subsection (B) does not apply to children, and purposely excludes them, is contrary to the plain meaning of the statute.

Congress, by utilizing a term ("comparable") that it had employed in similar benefit programs to establish near-identical treatment, insured both equity and uniformity of process

[15] Congress stated that the "definition of disability . . . used in the disability insurance program established under Title II of the Social Security Act would be generally applicable to disabled . . . people under age 65" in the SSI program. H.R. Rep. No. 231, 92d Sess., 1st Sess., *reprinted in* 1972 U.S. Code, Cong. Admin. News 4989, 5233.

for children. The term "comparable" has been discussed by this Court on at least three occasions.

Title XIX of the Social Security Act (Medicaid) has required that the medically needy be treated in a manner "comparable" to the categorically needy. 42 U.S.C. § 1396a(a)(10) (amended 1981), and (a)(17). *See Atkins* v. *Rivera*, 477 U.S. 154 (1986); *Schweiker* v. *Hogan*, 457 U.S. 569 (1982). In both cases, the Court recognized that Congress' requirement of comparability mandated near identity of treatment. While two groups may be situated in such a way that exactly congruent treatment may be impossible, comparable treatment requires that the treatment afforded be as close to identical as possible. Thus, the Court in *Schweiker* v. *Hogan* speaks of the comparability clause of 42 U.S.C. § 1396a(a)(17) as requiring identical treatment for the aged, blind, disabled and dependent. 457 U.S. at 573 n.6. The Court cited with approval four court of appeals decisions, all of which interpreted "comparable" to require that the identical rule of eligibility be applied to the categorically needy. *Id.* at 587 n.28.

This notion of near-identical treatment already was a concept that Congress found useful in mandating equal treatment for groups that, by their very nature, have certain features that defy exactly the same treatment. Thus, when Congress instructed the Secretary in 1972 to evaluate the severity of the impairments of children in a manner comparable to adults, it is reasonable to assume that it had in mind the same kind of near-identical treatment that it had established seven years earlier in a different title of the same Act.

Similarly, in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court construed a regulation requiring "comparable treatment" for special education children in public and private schools. Justice Blackmun there observed that, at the very least, "comparability" could not countenance a clearly "inferior program." *Id.* at 422 n.17. He added that, to achieve "comparability" among the two classes of beneficiary children, a

program would have "to equalize the level and quality of services offered." *Id.* at 425.[16]

Finally, by adding for children the modifier "*any*" before "medically determinable physical or mental impairment of comparable severity," Congress has expressed unambiguously its intent that "any" impairment which meets the statutory standard shall be found disabling. The Secretary's method of identifying only some comparable impairments does not satisfy the statute. Given the expressed congressional intention that children be afforded the opportunity to demonstrate they suffer from "any" impairment of "comparable severity" to one which would *actually*, even if not presumptively, disable an adult, the regulatory method for children must include the method offered to adults, *i.e.*, an opportunity for assessing actual degree of functional impairment.

B. The Childhood Listings-Only Method Does Not Embody The Functional Approach To Disability Evaluation Required By The Statute.

As the sole means of evaluating disability, the listings have several shortcomings.[17] First, any set of listings is never going to be complete given the complexities of the human organism, the ever changing nature of modern society and the impracticality of listing rare disorders. For example, AIDS and newborn drug addiction were virtually unknown 15 years ago; now

---

[16] The Secretary would define "comparable" to mean "'permitting or inviting comparison[,] often in one or two salient points only.'" (Pet. Br. 24). But individualized assessment is *the* salient feature of the program. Respondents do not assert that absolutely identical treatment must be afforded. However, given the "crucial" and determinative role that the Secretary has acknowledged the RFC has in adult adjudications, its exclusion for children belies the rhetoric that "essentially identical" evaluation methods are used.

[17] This is not to say that we reject their utility as a streamlining device; rather, we object to their use as the sole determinant of disability.

they are all too common. Second, modern science is constantly refining its diagnostic tools and procedures so that the medical indicia in the listings are frequently outdated. Third, even if a particular impairment is listed and the criteria are up to date, it is impossible to predict how different people will react to the same impairment. Subjective manifestations such as pain, dizziness and reactions to medication are impossible to predict with precision. Fourth, the listings cannot take the combined effect of multiple impairments into account without an individualized assessment of functional limitations. Finally, some claimants will be too young or too infirm to test, although there may be other ways to evaluate their impairments without resort to a particular listed procedure.

A graphic example of the limitations of the listings in evaluating rare childhood afflictions is seen in *Wilkinson* v. *Bowen*, 847 F.2d 660 (11th Cir. 1987) (*per curiam*), *following Powell* v. *Schweiker*, 668 F.2d 1357 (11th Cir. 1982). A ten month old infant, Derik Wilkinson, sought SSI on the basis of a rare chronic liver disease, Alpha I Antitrypsin deficiency, as well as significant developmental delay. 847 F.2d at 662. As described by the court, young Derik is

> essentially confined to his home, except for trips to the doctor. He swells, cannot eat, and runs a fever three or four nights a week. The swelling of his arms, legs, and feet causes pain. He has been hospitalized four times, and he tires easily. The doctors say he has a life-long condition, precluding a normal childhood and adult life. He has allergic reactions to any kind of food. He requires constant attention, and when he swells up, he must be held all night.

847 F.2d at 661-62. Despite the extraordinarily deleterious impacts of this condition, the Eleventh Circuit affirmed the Secretary's denial of SSI because Derik did not meet or equal the mental retardation listing, § 112.05(A), the closest listing the Secretary could identify. The Secretary's description of his approach in *Wilkinson* and similar cases "as a reasonable implementation of the statutory standard" (Pet. Br. 17-18) is contrary to the remedial purpose of the Act.

The Secretary has himself repeatedly acknowledged the serious limitations of the listings-only approach, as well as the need to go beyond the listings to provide realistic functional assessments. The regulatory history of the listings establishes their intrinsic limitations with regard to individual assessment of functional restrictions.

As originally published, the listings were thought to be "medical guides" intended to "facilitate identification of clear-cut cases," leaving "[c]onditions that fall short of the severity of those described in the guides [to be] evaluated in terms of whether in fact they prevent the applicant from engaging in any substantial gainful activity." *Administration of Social Security Disability Insurance Program, 1959: Hearings Before the Subcommittee on the Administration of the Social Security Laws of the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 334 (1959) (hereinafter, "*1959 Disability Insurance Hearings*").

In 1959, Dr. William Roemmich of SSA stated:

> I would like to emphasize that the guides are not now, and were at no time in the operation, intended to separate all applicants into allowances and denials. . . .
>
> [The] specific medical listings and guides in our operating manual . . . are administrative tools, rather than rules. They contain, in broad terms, clinical descriptions of the more common disabling conditions. They do not show all possible disabling conditions nor do they indicate the combining effect of different impairments.

Id. at 342.[18] The drafters of the listings never intended them to establish "cookbook adjudication" for claimants. *Id.* at 85. *Marcus*, 696 F. Supp. at 375.

---

[18] Associate Director Arthur E. Hess also testified that the listings were set at a higher level of severity than ultimately called for by the Act, in order to make presumptive allowances. Failure to meet the listings was not to lead to disallowance. *Id.* at 350.

From the point when the medical guides were published as the listings, 33 Fed. Reg. 11741 (1968), to the present, the limited screening role they were intended to have and their high level of severity has not changed. *See Marcus*, 696 F.Supp. at 375 & n.11. Indeed, the Secretary has repeatedly declared his own belief that the listings are not mechanisms to decide whether a person is disabled, and has assumed that only when one goes beyond the listings to an RFC assessment will a realistic determination of disability be obtained. *Id.* at 375-76 (citing such repeated regulatory statements).[19] The Secretary thus has adopted respondents' position by declaring that "the determination of RFC is crucial if the person does not meet or equal the Listings." 50 Fed. Reg. at 35042 (1985).

When the Secretary belatedly promulgated his Part B child listings, he placed them in the conceptual framework of the adult listings established almost two decades earlier. Just as Congress was assured in 1959 that the adult listings for disability insurance described only "the more common disabling conditions" and did "not show all possible disabling conditions nor . . . the combining effect of different impairments," *1959 Disability Insurance Hearings* 342, the Secretary in 1977 acknowledged the limitations of the new childhood listings, by

---

[19] *See, e.g.*, 44 Fed. Reg. 18178 (1979) (listings but "one element" in the determination process); 45 Fed. Reg. 55576 (1980) (response to comments that medical equivalence standards were too restrictive). In response to a criticism in 1979 of the narrow multiple sclerosis listing for failing to consider overall impact, the Secretary acknowledged:

> [M]ultiple sclerosis, a disease with variable and multiple manifestations, can be shown to be a severe impairment by a combination of symptoms and signs other than those described by the listed criteria. It is not possible, however, to reduce these multiple manifestations to a listing. The Listing is but one item in the evaluation process. We evaluate cases of claimants whose conditions do not meet or medically equal the criteria of a listed impairment under other rules. . . .

44 Fed. Reg. 18176.

admitting that they only "evaluate the more common impairments" and acknowledging the existence of "children who have an impairment that is not included in the Appendix." 42 Fed. Reg. at 14706.[20]

The limited, "screening" role of the listings and their facial inadequacy in addressing all possible impairments would not be objectionable if, like adults, children received the RFC assessment of "each claimant's individual abilities," *Campbell*, 461 U.S. at 467, or even if the listings stage could somehow fully take into account all the functional limitations of "any" impairment "which would actually, even if not presumptively, disable an adult." *Zebley*, 855 F.2d at 73. The Secretary's policies, however, foreclose both. He precludes an RFC assessment on the mistaken assumption that this can only be relevant and workable for those in the labor market, *see* Section III, *infra*. He admits that his listings "focus . . . not on the individual child's ability to function as such . . . ," and for the most part offer "no individualized consideration" of functional limitations. (Pet. Br. 38, 42). *See also* 42 Fed. Reg. 14706 (listings interpret "severity [of disability] in medical rather than functional terms").[21] The Secretary can make no claim greater than

---

[20] Not only do children with "uncommon" impairments find their way to benefits blocked, *Report of the National Commission on Orphan Diseases*, xiii (DHHS 1989) (surveying 5,000 rare diseases), but, indeed, even those with relatively common childhood impairments such as Down Syndrome, Tourette Syndrome, and autism do not have their impairments listed. H. Fox & A. Gearney, *Disabled Children's Access to SSI and Medicaid Benefits* 55 (1988) (hereinafter, "*Fox Report*") ("More often than not . . . the disability criteria exclude young children or simply ignore them."). The Fox Report and the National Commission Report, both funded by the Secretary, have been lodged with the Clerk of the Court.

[21] A more detailed picture of the Secretary's shortcomings in evaluating functional limitations is provided in the *Fox Report* 58-59 ("The disability criteria do not consider a child's functional limitations, such as limitations in the ability to perform age-appropriate daily activities like school and play . . . . The listing . . . does not address the functional limitations caused by an impairment in any uniform and consistent manner. . . .").

that "*some* of the criteria in Part B" assess functional capacity where "relevant." (Pet. Br. 42) (emphasis added).[22]

At least initially there was a possibility that, under a broad reading of the "equals" to the Listings concept, functional limitations could be assessed. *See* 1974 DIL (J.A. 97). However, even this avenue was later foreclosed by SSR 83-19. Contrary to the assertion of flexibility (Pet. Br. 40), since that Ruling was adopted it has been "incorrect to consider whether the listing is equaled on the basis of an assessment of *overall* functional impairment . . . . The functional consequences of the impairments (i.e. RFC), irrespective of their nature or extent, *cannot* justify a determination of equivalence." SSR 83-19 (J.A. 239-40) (emphasis in original).[23]

---

[22] The Secretary thus implies that all other functional incapacity is irrelevant in assessing "severity." This position is unfounded since the RFC assessment is applied to *all* adults who do not satisfy the listings. The Secretary's contention that he considers functional incapacity in the childhood listings wherever relevant also ignores the near-total absence of any reference to pain (which frequently results in functional limitations) in the listed criteria, despite the command of Section 3(a)(1) of the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 1382c(a)(3)(G) (Supp. IV 1986), to consider pain.

[23] When this restrictive equivalence policy is joined to a listings system which includes only discrete disorders, the result for children is:

> [t]he failure of the disability determination system to take into account the severely disabling impact of multiple impairments . . . . [E]ven some fairly common multiple impairments, such as ventilator-dependency and developmental delays, had not been addressed adequately. The significance of this problem was underscored by unpublished data from . . . the American Academy of Pediatrics Committee on Children with Disabilities [showing] that increasing numbers of children are surfacing with complex medical conditions that may involve as many as five or more different diagnoses.

Fox Report 54, 66 (disability criteria restrict access [to SSI] of children with multiple impairments). This inherent deficiency of the listings was acknowledged at the *1959 Disability Insurance Hearings* 342.

C. The Secretary's Listings-Only Approach Imposes A Standard Stricter Than Called For By Congress.

Had Congress intended to make children subject to a more stringent standard it easily could have done so. The Title II program for Disabled Widows and Widowers is just such a strict eligibility program, awarding benefits only to those who are precluded from performing "any gainful activity." 42 U.S.C. § 423(d)(2)(B). *See* H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code, Cong. Admin. News 3179, 3197 ("more restrictive definition of disability"). The Secretary has long had regulations that require widows and widowers to meet or equal the listings if they are to be considered disabled. 20 C.F.R. § 404.1526; *see also Yuckert*, 482 U.S. at 164 n.3 (Blackmun, J., dissenting).

The Secretary has explicitly recognized that by limiting both widows and children to a listings-only test, he imposes the "any gainful activity" threshold of severity:

> The level of severity of an impairment which a title II widow(er) or a title XVI child must meet or equal to be determined to be under a disability is that which is considered under the regulations to be sufficient to preclude engaging in *any gainful* activity (i.e., must meet or equal the Listings), as distinguished from SGA. The concept of "gainful activity," however, is used only in setting the requisite level of severity of the impairment in the Listing of Impairments and not otherwise.

SSA, POMS DI 00401.336 (J.A. 259) (emphasis in original).[24] There can be no doubt that the listings embody a level of severity that precludes "any gainful activity" and not just "substantial gainful activity." *Campbell*, 461 U.S. at 460; *Tolany* v. *Heckler*, 756 F.2d 268, 270-71 (2d Cir. 1985). The exclusive use of the listings, then, not only denies functional

---

[24] *See also* 50 Fed. Reg. 50118, 50120 (1985), contrasting general termination of benefits standard—ability "to engage in SGA"—with that of widow(er)s and SSI disabled children, where SSA "need only show the capacity to engage in gainful activity."

assessments but requires a level of severity higher than that legislated by Congress. Had Congress intended for children to meet such a standard, it easily could have required children to be found disabled only if they had impairments of "comparable severity to a disabled widow." Although Congress set a standard that compares children's impairments to those of disabled adults, and not disabled widows, the Secretary has distorted this congressional language to make children conform to the much stricter standard. However, the Secretary is not free to substitute his own judgment for that of Congress. Congress made a deliberate choice and must be presumed to have known what it was doing. *Schweiker* v. *Hogan*, 457 U.S. at 587.

In sum, the Secretary's listings-only approach for determining disability fails to meet the express intention of Congress that children be given the opportunity to show that they suffer from "any" impairment of "comparable severity" to one which would actually, even if not presumptively, disable an adult.

II. THE SECRETARY'S POLICY OF DENYING INDIVIDUALIZED FUNCTIONAL ASSESSMENTS FOR IMPAIRED CHILDREN HAS NOT BEEN CONSISTENT OR CONTEMPORANEOUS, NOR HAS IT BEEN APPROVED BY CONGRESS.

The Secretary has argued that his implementation of § 1614(a)(3) has been consistent and clear from the earliest days of the SSI program. From this assertion, he makes two interrelated arguments. First, he argues that his interpretation was contemporaneous and has been consistent, and therefore it is entitled to considerable deference. Second, he argues that Congress knew of and approved his interpretation either (1) when it enacted § 501 of the Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566, 90 Stat. 2667, 2685, which ordered the Secretary, *inter alia*, to promulgate long-delayed criteria for adjudicating the disability of children or, in the alternative, (2) through its silence. These arguments are baseless; the Secretary's position has been anything but consistent and, under established principles of statutory con-

tent and, under established principles of statutory construction, it is not entitled to special deference. Further, given these inconsistencies, Congress could not have been aware of, let alone approved, the rigid listings-only policy that eventually evolved. Indeed, much of the policy was either nonexistent or not available to Congress, making it impossible for Congress to have known that it was approving the Secretary's policies as they have now come to exist.

A. The Secretary Has Been Inconsistent In His Interpretation Of The Statute

There are at least four major areas where the Secretary has changed his policy or taken an inconsistent position. First, and perhaps most importantly, the Secretary at first adopted, and then rejected, the need for a working definition of the "comparable severity" standard. Second, the Secretary has taken an ambiguous and shifting position on the need to evaluate functional limitations for children. Third, the Secretary has taken the position, most fully articulated in this litigation, that an assessment of residual functional capacity, for children or adults, is not a *medical* determination, thereby contradicting his own regulation (20 C.F.R. § 416.945). Fourth, the Secretary has reversed himself on the importance of the role of equivalence in the disability adjudication process, stripping it of the flexibility it once had, as applied to both child and adult claimants.

1. Inconsistency On The Need For A Working Definition Of "Comparable Severity"

At the inception of the SSI program, the Secretary issued the two policy statements ("Disability Insurance Letters" or "DILs") that were to be the basis for deciding childhood disability claims. (J.A. 89, 94). The first DIL stated that "disability in children must be defined in terms of the primary activity in which they engage, namely growth and development, the process of maturation." (J.A. 90).

ments and also promised a regulatory definition of the phrase "impairment of comparable severity" (J.A. 95), noting that "[n]ot all children's impairments will lend themselves to formal codification." (J.A. 97). His recognition of the need for a working definition of "comparable severity" was a recognition that non-listed impairments in children, as in adults, could be disabling even when no listing was met or equaled. Obviously, if the listings were to be the end of the inquiry, such a definition would hardly have been needed. On the other hand, if adjudicators were going to make flexible, individualized assessments of functional capacity in children, such a definition as the Secretary promised to produce would be essential.

By 1977, however, when he promulgated the long-awaited final regulations, the Secretary had reversed himself. One searches the regulations in vain for any workable definition of comparable severity. The only mention of comparability comes not in the regulations themselves but in the preamble, where the Secretary explained that he had tried to equalize the average level of severity in the adult listings and the child listings.[25] 42 Fed. Reg. 14705 (1977). However, far from putting children on an equal footing with adult claimants, such equalization simply prevented "transitional problems," *i.e.*, a child who met the child listings would automatically meet the adult listings. *Id.* Totally abandoned was the notion that children would be adjudicated using a standard comparable to that by which an adult is adjudicated.

2. Inconsistency On The Relevance Of Functional Evidence

The Secretary has exhibited an ambiguous and contradictory approach toward the evaluation of functional limitation in children. However, the question of whether an impairment is

[25] Indeed, several of the 57 child listings were taken verbatim from the adult listing, or were modified only by a word or two. *E.g.*, §§ 102.02, 102.08, 107.5, 107.11, 111.02 and 111.05.

disabling is a question of functional limitation.[26] Consistent with this overriding principle, the Secretary's initial policy, as embodied in the 1974 DIL, emphasized the need to seek out "adverse factors of learning and behavior" to see whether there were any impairments in intellectual, social and emotional developmental progression (*i.e.*, impairments which did not "lend themselves to formal codification") in addition to those contained in the listings. (J.A. 97-98). It also directed adjudicators to look to "growth—increase in size and maturation of physical and functional characteristics, learning, mastering basic skills and emotional and social development" (J.A. 96), all measures of functional limitation. These instructions clearly acknowledged the need to ascertain how the ability to function in primary activities for adults and children could be determined so that comparisons could be made. The overall goal, then, was to compare the *impact* of the impairment on the child's life with that of the impact of a similar impairment upon an adult's life. (J.A. 96). This was clearly a functional approach.

But by 1977, the Secretary had retreated from his earlier position. The preamble to the final regulations asserts that severity must be assessed in "medical rather than functional terms" and that consideration of "[d]evelopmental needs . . . such as counseling, special education, trairing, rehabilitation, guidance, etc. are not within the scope of the law." 42 Fed. Reg. at 14706.

The Secretary sounds a similar note in his brief, imposing an explicit methodology that relies on "medical factors alone"

[26] Medical professionals can diagnose the impairment and even predict some of the kinds of likely limitations. However, human experience is varied. A medical condition that would leave one person confined to a wheelchair and unable to work might not lead to any discernible functional limitation in the case of President Roosevelt. Thus, "[t]he Social Security Act defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function . . . ." *Campbell*, 461 U.S. at 459-60. *Only* impaired ability to function results in disability.

(Pet. Br. 38), precluding evidence "on the individual child's ability to function as such" (*id.* 42), and denying the workability and even the legality of evaluating children in terms of "age appropriate activities." (*Id.* 44). Having abandoned a broad approach that sought to gather as much evidence of functional limitation as practically possible, since 1977 the Secretary has adhered to a policy that considers functional limitation only where explicitly allowed by a handful of individual listings and then only in the crabbed terms allowed by the particular listing. (*Id.* 42).

3. Inconsistency On The Nature Of The RFC Assessment

A related inconsistency has been the Secretary's artificial distinction between "medical" and functional evidence and his denial that his inquiry into an adult's residual functional capacity is a medical determination, in order to support his contention that such an inquiry is inappropriate for children.[27] Such a distinction was also made in the Secretary's 1977 rulemaking, where he attempted to justify his listings-only approach on the grounds that he was obligated to look only at medical factors, which he equated with the listings, as if no other medical evidence were relevant. 42 Fed. Reg. at 14706. Such a position is markedly different from that taken in the earlier Disability Insurance Letters, which called for a full development of evidence beyond the listings.

Cast aside in the Secretary's later policies were his very first instructions of September 1973 emphasizing that "abnormalities" in function *cannot* always be fully demonstrated by clinical and laboratory diagnostic techniques (J.A. 97-98), thus necessitating inclusion of "adverse factors of learning and

[27] The Secretary attempts to distinguish what he terms the "medical" evidence called for in the listings and all other evidence of disability, which is usually referred to in pejorative terms, *e.g.*, "amorphous . . . unspecified non-medical factors." (Pet. Br. 15).

behavior." (*Id.*). In the 1973 DIL, the Secretary defined medical factors broadly to include "a child's activities, behavioral adjustment, and school achievement." (J.A. 91). *See also* 1974 DIL (J.A. 97-98). In 1977, the Secretary reversed himself, excluding functional impact indicators such as the need for special education as "not within the scope of the law." 42 Fed. Reg. 14706. Thus, Joseph Love, a maladjusted ten year old with organic brain syndrome, who failed first grade three times and was removed from a special education class (J.A. 50), would, under the earlier policies, have had his educational failures and need for special education assessed; however, under the later listings-only policy he could not have his need and evidence of behavioral disorders taken into account.[28]

By imputing a skewed, overly restrictive meaning to the term "medical," contrary to established medical thought and practice, *see* Am. Br. of A.M.A. and Amer. Acad. of Pediatrics *et al.*, as well as his own original interpretation of the term, the Secretary has foreclosed realistic assessments of children. His methodology has guaranteed that, however dysfunctional a child was, such dysfunction could not be taken into account, while similar dysfunction would be taken into account in adult disability determinations at the RFC stage. *City of New York*, 476 U.S. at 471.

The Secretary's litigation position on the nature of the adult RFC assessment is even inconsistent with his own regulations, which state that "[r]esidual functional capacity is a medical assessment," 20 C.F.R. § 416.945(a), that also allows the consideration of testimony regarding symptoms beyond those necessary for diagnosis. Although limitations such as pain and

[28] Since his brief to this Court was written, the Secretary has again changed his position on the relevance of the need for "special education." Now, in his proposed rulemaking, the Secretary has *endorsed* inquiry into this need and declared "special education" evidence to be "medical evidence" rather than "supplemental data." 54 Fed. Reg. 33242 (1989).

other subjective complaints are not part of the listings, they are decidedly part of the overall medical assessment of disability. 42 U.S.C. § 1382c(a)(3)(F) (Supp. IV 1986). Indeed, if they were not so assessable, it is difficult to see how the Secretary could take them into account, given the statutory mandate for medical determinations, 42 U.S.C. § 1382c(a)(3)(C).

The Secretary's third inconsistency, then, is in considering such limitations for adults in the admittedly "medical" determination of RFC, while asserting that he is legally precluded from doing so for children on the grounds that such determinations are, for them, "non-medical." (Pet. Br. 15, 28, 33, 38); *see also* 43 Fed. Reg. 55349 (1978) ("medical considerations alone" used for SSI child claimants); 45 Fed. Reg. 55570-71 (1980) (children "to be assessed only in medical terms").

4. Inconsistent Interpretation Of "Equivalence"

The final inconsistency that precludes deference to the Secretary's listings-only approach is the dramatic change in the role of equivalence in childhood disability determinations. Early in the program, the Secretary took a flexible view of equivalence and encouraged adjudicators to rely "heavily" upon equivalence to decide difficult cases. (J.A. 97). Not only would equivalence play an important role where no particular listing applied, but adjudicators were directed to use the equivalency concept in multiple impairment cases where each impairment fell short of the relevant listing. (*Id.*). In such cases, the combined effect on major daily activities of each impairment was to be taken into account to determine whether the combination of impairments equalled a listed impairment. (*Id.*).

This flexible approach was later jettisoned when the Secretary adopted SSR 83-19.[29] That Ruling rejected the earlier

[29] Beginning almost immediately, "equivalence" findings began to drop precipitously, to the extent that such a finding became an anomaly. Comm. on Ways and Means, 101st Cong., 1st Sess., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, Sec. II, Table 2 (Comm. Print 1989).

formulations, stating that "it is incorrect to consider whether the listing is equalled on the basis of an assessment of overall functional impairment . . . . The functional consequences of the impairments (i.e., RFC), irrespective of their nature or extent, *cannot* justify a determination of equivalence." SSR 83-19 (J.A. 239-40) (emphasis in original). Thus, there can never be an "equals" decision based on an individualized assessment of functional limitations, however "severe" the limitations, for either an unlisted impairment or a combination of them. This posture prohibited any meaningful inquiry into functional limitation, and marked a major departure from previous policy.

B. The Secretary's Current Interpretation Is Not Due Any Special Deference Because Of His Inconsistencies.

Because the Secretary's interpretation of the statutory provision at issue has changed over the years, his construction loses the deference to which it would otherwise be entitled as an agency's interpretation of legislation it is charged with implementing. *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. at 446 n.30; *Watt* v. *Alaska*, 451 U.S. 259, 272-73 (1981); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976). The Court has on more than one occasion declined to grant any special deference to the HHS (or HEW) Secretary's interpretation of a statute he was charged with implementing, precisely because his interpretation had "evolved" over time. *See Bowen* v. *American Hospital Ass'n*, 476 U.S. 610, 645-46 & n.34, (1986) ("*AHA*") (plurality opinion); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.11 (1979)

An agency's current interpretation of a statute need not be directly contrary to its prior construction to deprive the later construction of the deference normally afforded. Administrative interpretations which have "evolved" over time also lose the deference to which they would otherwise be entitled. *See, e.g.*, *AHA*, 476 U.S. at 645-46; *American Mining Congress* v. *EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987).

An agency which has taken a "somewhat inconsistent posture" will not be given any special deference with respect to its

current interpretation of a statute. *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). This includes situations where the agency's interpretation of a given statutory provision changed from a broad one to a more narrow one, *see, e.g., American Mining Congress*, 824 F.2d at 1181-82, or has changed from a narrow one to a broader one, *see, e.g., Barnett* v. *Weinberger*, 818 F.2d 953, 960-61 (D.C. Cir. 1987). It also includes situations where the agency's interpretation has been "erratic." *See Cardoza-Fonseca*, 480 U.S. at 447 n.30.

Ultimately, the question to be asked is not whether there has been a total reversal in administrative construction, which is rare, but rather whether the agency's current interpretation, in regulations or in its litigation posture, constitutes a "significant change" from that taken by the agency previously. *Compare Fed. Elec. Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 (1981), and *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981), *with Barnett* v. *Weinberger*, 818 F.2d at 961-62 (administrative interpretation of statutory term "custodial care" was changed "in a significant way," and therefore did "not merit a substantial degree of respect").

Under these standards, the inconsistency in the Secretary's various positions deprives his current position of any special deference that it would otherwise be due. These inconsistencies are at least as significant as the inconsistencies which this Court has noted in refusing to grant special deference to various agencies' later statutory constructions. For example, in *Southeastern Community College*, the Court refused to give any special deference to the Secretary's construction of § 504 of the Rehabilitation Act of 1973 as authorizing him to promulgate regulations requiring recipients of federal funds to undertake affirmative action to accommodate handicapped individuals, because, for the first three years after the statute was enacted, "HEW [now HHS] maintained the position that Congress had not intended any regulations to be issued." 442 U.S. at 412 n.11. The Secretary had never issued regulations contradicting

the regulations at issue, but had simply taken the position, earlier on, that *no* regulations were authorized.

In this case, the Secretary originally saw the statute as requiring something beyond a listings-only approach (J.A. 95, 97) and, as we shall see, *infra*, pp. 37-38, even "led Congress to believe" that this was his interpretation, *Morton* v. *Ruiz*, 415 U.S. at 237. After Congress ordered him to publish *some* standards for assessing children's SSI disability claims, the Secretary responded only with the listings, asserting that this was all that was required. This hardly constitutes the "consistent" approach from "the outset of the SSI program" suggested by the Secretary in his brief. (Pet. Br. 17). Rather, as in *Southeastern Community College*, the fact that the agency has "altered its stand . . . . substantially diminishes the deference to be given to [its] present interpretation of the statute." 442 U.S. at 412 n.11.

In *AHA*, 476 U.S. at 645-46, a plurality of the Court found inappropriate the granting of any special deference to regulations designed to insure hospitals' provision of medical care to severely handicapped newborns, because the Secretary's regulations, while not directly inconsistent with previous constructions, had "evolved" over a two year period. Similarly, in his 1974 DIL (J.A. 94), the Secretary recognized that the provisions for children's disability "will require not only the development of additional more specific criteria, but also a definition of the phrase 'impairment of comparable severity,'" thus clearly implying that "comparable severity" could not be fully addressed by the listings alone. Nevertheless, in his subsequent promulgation of "criteria" for assessing childhood disability claims, he adopted a listings-only approach, thereby rejecting by omission the need for any definition of "impairment of comparable severity" going beyond the listings. As in *AHA*, 476 U.S. at 646, such inconsistency deprives the Secretary's current position of any special deference.

Finally, in *Cardoza-Fonseca*, this Court rejected the Government's position that two different statutory standards,

applicable to aliens' requests for relief from deportation on the basis of threatened persecution, were identical. In so doing, the Court rejected the Government's contention that its position was entitled to heightened deference as an administrative construction, because of the "inconsistency of the positions the BIA [Board of Immigration Appeals] has taken through the years," noting that "[t]he BIA has answered the question . . . in at least three ways." 480 U.S. at 446-47 n.30. As in *Cardoza-Fonseca*, the Secretary's construction of the "comparable severity" provision "has not consistently agreed with" his current litigation position.

C. Congress Has Not Approved The Secretary's Construction; Rather Its Action Suggests Disapproval.

The Secretary argues that Congress has expressed its "approval" of his current interpretation of the statute by the requirement, in § 501(b) of the Unemployment Compensation Amendments of 1976, that the Secretary promulgate criteria to be employed in determining disability under 42 U.S.C. § 1382c(a)(3). However, this Court has specifically noted that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983). For the Court to find congressional approval, there must be full knowledge by the entire Congress of the administrative construction of the earlier statute at the time the second act was passed, and there must have been some affirmative indication of approval by the subsequent Congress. *TVA* v. *Hill*, 437 U.S. 153, 192 (1978). No such approval has ever been given by Congress to the narrow listings-only interpretation, nor was Congress aware of the Secretary's interpretation at any time that it was considering making, or in fact made, amendments to the original legislation. Under these circumstances, congressional inaction is of little if any significance as a factor supporting the Secretary's interpretation. *See SEC* v. *Sloan*, 436 U.S. 103, 120-21 (1978).

1. The 1976 UCA Did Not Ratify The Secretary's Current Policy.

Far from constituting "express approval" of existing SSA policy, the legislative history of the Unemployment Compensation Amendments of 1976 shows that Congress was extremely dissatisfied with the Secretary's approach to the SSI children's disability program, and with his inaction. Contrary to the Secretary's representations (Pet. Br. 30), both Congress and SSA recognized that the situation was chaotic because the Secretary had failed to publish any detailed guidelines for the adjudication of childhood disability. A blue ribbon "Study Group" recommended legislation to create "a more specific definition for disability of a child," that would take into account the developmental nature of many childhood impairments. *Oversight of the Supplemental Security Income Program: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 21 (1976) (hereinafter, "*1976 Hearings*"). Commissioner Cardwell told Congress that it was important to remedy the difficulty and inequity that had been experienced by children. *Id.*

Ultimately, the Secretary told Congress that he agreed with the Study Group's concern, but denied the need for legislation. The two DILs (J.A. 89, 94), the Secretary claimed to Congress, formed the basis for clearing up the difficulty and unfairness that had arisen from the lack of coordination. *1976 Hearings* at 22. Congress relied upon these two policy statements in passing the UCA. *See Supplemental Security Income Program: Hearings Before the Subcomm. on Public Assistance of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 781-82 (1975).

The two DILs called for a review that was much closer to the individualized determination enjoyed by adults. The September 1973 DIL, which drew on the experience gained in the Title II Child Disability program (J.A. 89), stated that "disability in children must be defined in terms of the primary activity in which they engage, namely growth and develop-

ment, the process of maturation" (J.A. 90), and therefore called for the gathering of evidence of functional limitations. (J.A. 91). As noted above the 1974 DIL also promised a definition of comparability. (J.A. 95).

The Secretary argued in 1976 that legislation was unnecessary, but Congress, surveying the SSI program, was not pleased. Two years after the program began, Listings of Impairments for children had not yet even been published, nor had any work been done to further define "comparable severity" or to explain how an equivalence determination was to be made.

Utilizing the language of the DILs, Representative Mikva of the Ways and Means Committee proposed an amendment to H.R. 8911 to mandate publication of criteria for determining disability:

> The amendment mandates that this criteria take into account not only the medical development of the child but also the child's social, educational, and personal development. . . .
>
> . . .
>
> [T]he assessment should refer to the impact of the child's handicap on his ability to function successfully within age-appropriate expectations. The child's functional capacity within the areas of learning, language, self-help skills, mobility, and social skills are decidedly more meaningful in determining both the severity of his impairment and his developmental potential.
>
> In addition to the development of specific and standardized disability criteria for children, guidelines should be established in order to obtain the existent information, such as school records and developmental assessments, required to evaluate effectively a child's functional capacity.

122 Cong. Rec. 27855 (1976). The amendment[30] passed easily and went to the Senate.

In the same session, Senator Hathaway, a member of the Senate Finance Committee, described the similar Senate amendment that eventually was adopted, using language very similar to the DILs:

> This test of comparable severity for a child's disability is required in current law. Like the test for determining the disability of an adult, a disability is not determined solely on medical grounds but also includes an evaluation of the impact of the disability on the person's abilities . . . . The assessment, rather, should refer to the impact of the child's handicap on his ability to function successfully within age appropriate expectations. The child's functional capacity within the areas of learning, language, self-help skills, mobility and social skills are decidedly more meaningful in determining both the severity of the impairment and the developmental potential of the child.

122 Cong. Rec. 34026 (1976). Further, Senator Hathaway viewed medical criteria expansively:

> Medical criteria used in the broad sense of the total health development of the child could indeed provide the basis for determining the comparable severity of a child's disability. Medical criteria which are restrictively drawn . . . are not going to provide a definition of disability relevant to the person under the age of 18. A test of comparable severity is needed and is required in the present definition of disability for such persons. . . .

---

[30] The provision in H.R. 8911 stated:

> (e) The Secretary shall, within 120 days after the enactment of this subsection, promulgate by regulation criteria (including medical, social, personal, educational, and other criteria) for the determination of disability in the case of persons who have not attained the age of 18.

94th Cong., 2d Sess., 122 Cong. Rec. 27853 (1976).

Id. Senator Hathaway certainly did not endorse a listings-only approach. Senator Bentsen, also a member of the Finance Committee, criticized the Secretary's failure even to notice the SSI children's program. 122 Cong. Rec. 33301 (1976). The Senate version of the bill was enacted.[31]

The basis of the Secretary's argument for congressional approval ignores this legislative history and focuses on the Senate report accompanying the UCA. S. Rep. No. 1265, 94th Cong., 2d Sess. 24, *reprinted in* 1976 U.S. Code, Cong. Admin. News 5997, 6018. That report did indeed note that the Secretary had a regulation that called for children to meet a listing or satisfy a broad equivalency test. *Id.* The report, however, was critical of the Secretary, calling his existing guidelines inadequate. *Id.* The report's observation that, while SSA had issued several statements on the program, no specific guidelines had been sent out for the state agencies to follow, *id.*, is a strong indication that the Senate expected more than a listings-only program, as the 1974 DIL already contained listings adapted for children. (J.A. 104-14). Rather than approving the Secretary's regulation, the Senate report focused on the Secretary's shortcomings and reflected general congressional dissatisfaction. Promised but undelivered policies on the definition of comparable severity (J.A. 95), and the "compilation of data on 'developmental milestones'" (J.A. 98), were what Congress wanted.

At a minimum, in order to support a conclusion that Congress has approved an administrative construction of a statute,

---

[31] Senator Bentsen assured his colleagues that the House saw no functional difference between the two provisions, 122 Cong. Rec. 33301-02; the House Conference Committee did not think the two versions dissimilar enough to warrant comment. H.R. Conf. Rep. No. 1745, 94th Cong., 2d Sess. 22, *reprinted in* 1976 U.S. Code, Cong. Admin. News 6032, 6046. Thus, Congress was of one mind that the Secretary's performance was deficient *and* that individualized determinations based on the impact of impairments were appropriate under the existing comparable severity standard.

the entire Congress must have been made fully aware of that construction and of the issue of its possible inconsistency with the statutory provision, when it was making other amendments. *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21, 193 (1969); *Bob Jones University* v. *United States*, 461 U.S. 574, 599-601 (1983); *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). The Senate report cited by the Secretary did not mention whether the Secretary's regulations could be construed as limiting children to an evaluation under the listings, or the issue of whether, if they could be so construed, they might be inconsistent with the statute; nor did it express any opinion whatsoever on the wisdom of those regulations. From this one report, no general congressional awareness of the Secretary's restrictive construction can be inferred. *See Sloan*, 436 U.S. at 120-21. *See also Blanchard* v. *Bergeron*, __ U.S. ____, 109 S.Ct. 939, 947 (1989) (Scalia, J., concurring).[32]

A more fundamental problem with the Secretary's contention of "general congressional awareness" of his construction of the statute lies in its evolution over time. In 1976, the Secretary's only published statement on this issue, as paraphrased in the Senate Finance Committee report, was 20 C.F.R. § 416.904 (1975), which referred to satisfaction of the listings or medical equivalence to a listed impairment. However, as noted above, the DILs clearly stated that more than just a listings approach

---

[32] Furthermore, even if the Senate Finance Committee report could be said to provide some evidence of limited congressional awareness in 1976 of the Secretary's developing construction of the statute, it is impermissible to infer from this one report that the *entire* Congress was aware of this construction and its possible inconsistency with the statute. As explained in *Sloan*:

> [W]hile it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber*. . . .

436 U.S. at 121. *Compare Yuckert*, 482 U.S. At 151-52 (explicit endorsement in all three legislative reports).

would be utilized and that equivalence would be applied flexibly.

It was entirely reasonable in 1976 for Congress, following the Secretary's interpretation, to consider "medical equivalence" as allowing any impairment or combination of impairments to be individually assessed for functional consequences of "comparable severity." Accordingly, even if Congress had "approved" the Secretary's then-applicable policies when it passed the UCA in 1976, it could not have been aware of the Secretary's later shift in policy that precluded equivalency based on functional limitations.

In sum, rather than enshrining the Secretary's nascent listings-only approach, Congress was concerned in 1976 that children receive realistic determinations and wanted the Secretary to end the confusion by promulgating regulations that made good on his promises and assurances. The language used by the provision's prime sponsors, Representative Mikva and Senators Bentsen and Hathaway, goes well beyond a listings-only approach, as did SSA's early policy.

2. Congress Has Not Approved The Secretary's Current Interpretation Through Inaction.

The Secretary further argues that, even if the UCA did not constitute congressional approval of his policy, Congress' subsequent inaction has constituted such approval. Citing *Schweiker* v. *Chilicky*, ___ U.S. ___, 108 S.Ct. 2460 (1988), and *Yuckert*, he argues that there was "comprehensive congressional oversight" of the SSI disability standards. (Pet. Br. 34-35). An exception to the requirement of express approval may apply where the administrative interpretation of a statute has clearly and repeatedly been brought to the attention of Congress through its oversight function, and Congress nevertheless has refused to correct that interpretation. *See, e.g.*, *Heckler* v. *Day*, 467 U.S. 104, 111-15 (1984); *Bob Jones University*, 461 U.S. at 600-01. However, at a minimum, it must be shown that Congress, although repeatedly having been

informed of the agency's construction and having taken no action thereon, at least considered the propriety of the specific administrative s[illegible]tory construction at issue.[33]

Whatever "oversight" can be said generally to have existed over the Social Security Administration's programs, Congress as a whole has not addressed itself to the particular interpretation at issue. Indeed, the children's SSI disability program has been marked by relative invisibility to a Congress that has been primarily concerned with the much larger, and more controversial, adult Social Security programs.

III. THE SECRETARY ALREADY HAS DEVELOPED WORKABLE STANDARDS TO INSTITUTE INDIVIDUALIZED FUNCTIONAL ASSESSMENTS OF CHILDREN.

The Secretary repeatedly asserts that a functional assessment of impairments comparable to the RFC evaluation given adults is impossible because children are too young to be compared to those in the work force. He argues, in particular, that "there is no analogous benchmark [to the ability-to-work criterion] that can feasibly be adopted for use with children" such as "ability to engage in age-appropriate activities." (Pet. Br. 44). However, his past policy pronouncements, his policy of performing RFC assessments in the Title II Child Disability insurance program, his criteria for determining when to terminate SSI benefits for children, 20 C.F.R. § 416.994, and his recent revisions to the children's mental impairment listings all belie that contention.

---

[33] Such was clearly the case in *Day*, where the Court noted that Congress had taken up the question of the Secretary's delay almost annually, but attempts at passing mandatory deadlines repeatedly had been rejected. 467 U.S. at 118 n.30. *Compare Aaron* v. *SEC*, 446 U.S. 680, 694 n.11 (1980) (Congress' inaction after having twice been expressly informed of Commission's interpretation insufficient basis to presume congressional approval where "legislative consideration of those statutes was addressed principally to [other] matters. . . .").

First, at several points the Secretary has used a standard that analogizes the ability to engage in age-appropriate activities to ability to perform substantial gainful activity. In explaining the formulation of a "comparable severity" test, he initially stated:

> [I]t is necessary to define how the ability to function in primary activities appropriate for adults and children may be determined . . . . This term ["disability"], when applied to children, cannot properly be associated with an inability to work . . . . [D]isability in children must be defined in terms of the primary activity in which they engage, namely growth and development, the process of maturation.

1973 DIL (J.A. 90). Thus the Secretary recognized the relevance, indeed the necessity, of a functional test geared to the developmental progress of the child. That the Secretary contemplated evaluation of daily functioning relevant to the child's life is shown by his extensive explanation of the need to evaluate the "adverse factors of learning and behavior" to address realistically the "significant number of children [who] are impaired in their intellectual, social, and emotional development progression." 1974 DIL (J.A. 97-98).

Second, although the Secretary argues strenuously that RFC determinations for children are impossible, since 1956 he has administered the Title II Child Disability insurance benefit program, under which benefits are paid to children of dead, disabled or retired workers, who become disabled in childhood. 42 U.S.C. § 402(d) (1982 & Supp. IV 1986); 20 C.F.R. § 404.350. This program evaluates disability in the childhood years using the same definition of disability and five-step sequential evaluation process as that used for disabled adult workers. 42 U.S.C. § 402(d)(1)(G) (Supp. IV 1986); 20 C.F.R. § 404.1511(a). *See also Allegra* v. *Bowen*, 670 F. Supp. 465, 467 (E.D.N.Y. 1987) (the "Secretary uses a five-step sequence to evaluate [such] disability claims"). This broad functional assessment comports with Congress' anticipation that such functional indicators as "school and other records" of children would be utilized in these

evaluations. S. Rep. No. 2133, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code, Cong. Admin. News 3877, 3882.

Third, although the Secretary pejoratively describes "age-appropriate activities" as "amorphous," "not . . . workable," and with "no foundation in the . . . statute" (Pet. Br. 44), his own SSI regulations expressly employ this term as the child's equivalent of an adult's "ability to work." In regulations promulgated pursuant to § 2 of the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(f), the Secretary sets out his standard for determining whether a beneficiary has ceased to be disabled. 20 C.F.R. § 416.994. In the subsection governing SSI children's cases, the Secretary states that he first determines whether "medical improvement" exists and, if so, whether this "is related to your *ability to work (i.e., your ability to perform age-appropriate activities).*" § 416.994(c) (emphasis added). The regulation further provides that, when medical improvement occurs, and the severity of the prior impairment(s) no longer meets or equals the listings, "we will find that the medical improvement was related to your ability to work (*i.e.*, your ability to perform age-appropriate activities)." § 416.994(c)(1)(ii). In short, the Secretary explicitly recognizes that his review policies for SSI child beneficiaries assess the equivalent of "work" abilities, specifically equating them to "age-appropriate activities"; yet he argues vociferously that such formulations are totally inappropriate, unworkable and with "no foundation in the . . . statute." (Pet. Br. 44).

In addition, the newly proposed "Mental Disorders in Children" listings, 54 Fed. Reg. 33238 (1989), further undercut the argument that it is not "feasible" to use age-appropriate activity as a viable "benchmark." (Pet. Br. 43-44). In this proposal, the Secretary specifically accepts the ability to engage in age-appropriate activity as one of the primary determinants of disability. 54 Fed. Reg. at 33242.

Further, in his newly proposed listings the Secretary has taken a much more functional approach. As part of that approach, the Secretary plans to use deficiencies in concentra-

tion, persistence or pace resulting in "frequent failure to complete work-like tasks in a timely manner" as one of four indicia of functional impairment. *See* proposed § 112.02(B)(2)(d), 54 Fed. Reg. at 33244. In addition, the Secretary has decided that because Personality Disorders "do not usually manifest themselves until later in childhood," 54 Fed. Reg. at 33240, all such children should be evaluated under the adult listing, § 12.08. One of the four functional indicia in that listing is "deterioration or decompensation in work or work-like settings." § 12.08 (B)(4). The Secretary obviously intends, then, to examine a child's performance in a "work-like setting." Thus, the new proposed regulations are patently inconsistent with the Secretary's position that children are so divorced from the work force that he cannot make RFC determinations for children or draw any useful analogies between children and disabled adults. (Pet. Br. 44).

Finally, functional assessments have long been part of the accepted diagnostic and treatment procedures in the medical community. Because functional assessments of the impact of a child's developmental, medical and behavior problems upon day-to-day activities are so critical to treatment, the medical community has made them an essential and "workable" part of medical practice. See Am. Br. of Amer. Acad. of Child & Adolescent Psychiatry, Amer. Psychiatric Ass'n *et al.*; Am. Br. of A.M.A., Amer. Acad. of Pediatrics *et al.*

The Secretary has at his disposal not only the practices of his own agency, but also the expertise of the established medical community. Thus the purported lack of available "benchmarks" cannot justify the Secretary's current policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN M. STEIN
(Counsel of Record)
THOMAS D. SUTTON
SHELDON V. TOUBMAN
RICHARD P. WEISHAUPT
Community Legal Services, Inc.
Sylvania House, 1324 Locust Street
Philadelphia, Pennsylvania 19107
(215) 893-5300

MARK KAUFMAN
Delaware County Legal Assistance Association
410 Welsh Street
Chester, Pennsylvania 19013
(215) 874-8421

Of Counsel:
JAMES M. LAFFERTY

APPENDIX

APPENDIX

1. Section 1614(a)(3)(A) of the Social Security Act, as codified at 42 U.S.C. § 1382c(a)(3)(A) provides in pertinent part:

> An individual shall be considered to be disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

2. Section 1614(a)(3)(F) of the Social Security Act, as codified at 42 U.S.C. § 1382c(a)(3)(F) (Supp. IV 1986) provides:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

3. 20 C.F.R. § 416.924 provides:

> **How we determine disability for a child under age 18.**
>
> We will find that a child under age 18 is disabled if he or she—
>
> (a) Is not doing any substantial gainful activity; and
>
> (b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)—
>
> (1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or

(3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of Part 404 of this chapter.

4. 20 C.F.R. § 416.920a(c)(3) provides:

Evaluation of mental impairments.

If you have a severe [mental] impairment(s) but the impairment(s) neither meets nor equals the listings, we must then do a residual functional capacity assessment, unless you are claiming benefits as a disabled child.

5. 20 C.F.R. 416.925(a) provides in part:

Purpose of the Listing of Impairments.

The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity.

6. 20 C.F.R. § 416.945(a) provides in part:

Your residual functional capacity.

Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairments of which we are aware. We consider your capacity for various functions as described in the following paragraphs[:] (b) physical abilities, (c) mental impairments, and (d) other impairments. Residual functional capacity is a medical assessment. However, it may include descriptions (even your own) of limitations that go beyond the symptoms that are important in the diagnosis and treatment of your medical condition . . . . [U]sing the guidelines in §§ 416.960 through 416.969, your vocational background is considered along with your residual functional capacity in arriving at a disability decision.

7. 20 C.F.R. § 416.994(c) provides:

Disabled persons under age 18 (children).

If you are entitled to disability benefits as a disabled child under age 18, there are a number of factors we consider in deciding whether your disability continues. We must determine if there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work (i.e., your ability to perform age-appropriate activities) . . . . If medical improvement related to your ability to work has not occurred and no exception applies, your benefits will continue. Even where medical improvement related to your ability to work has occurred or an exception applies (see paragraph (c)(4) of this section for exceptions) in most cases before we can find that you are no longer disabled, we must also show, based on current medical evidence, that you no longer suffer from any medically determinable physical or mental impairment(s) of comparable severity to any impairment(s) which would make an adult disabled. As set out in § 416.923, this will be determined based on whether or not your impairment(s) meets or equals the requirements in Appendix 1 of Subpart P of Part 404 of this chapter.

8. SSA, Program Operations Manual System, DI 00401.335, provides:

Inability To Engage In Any Gainful Activity: Title II Widow, Widower or Surviving Divorced Spouse/Title XVI Child Under Age 18

In the Listing of Impairments, the regulations describe impairments of a level of severity deemed to preclude an individual from engaging in *any* gainful activity. An applicant for title II disabled widow's, widower's, or surviving divorced spouse's benefits or title XVI child's benefits *must* have an impairment(s) that meets or equals an impairment in the Listing.

As in the case of a title II worker or CDB [Child Disability Benefits] applicant or a title XVI claimant age 18 or older, a title II widow(er), or title XVI child whose work demonstrates ability to engage in SGA is *not* under a disability. The level of severity of an impairment which a title II widow(er) or a title XVI child must meet or equal to be determined to be under a disability

is that which is considered under the regulations to be sufficient to preclude engaging in *any gainful* activity (i.e., must meet or equal the Listings), as distinguished from SGA. The concept of "gainful activity," however, is used only in setting the requisite level of severity of the impairment in the Listing of Impairments and not otherwise.